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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TRANELL CALVIN HOLMES, Defendant and Appellant.	A119144 (Alameda County Super. Ct. No. C148252)

I. INTRODUCTION

A jury found Tranell Calvin Holmes guilty of the first degree murder of John Mestre, with special circumstances of murder during robbery and involving the infliction of torture (count one; Pen. Code, §§ 187, subd. (a), 190.2, subds. (a)(17)(A) and (a)(18)), and a serious-felony allegation of personal use of a cutting instrument (*id.*, § 12022, subd. (b)(1)). In a related count, the jury found Holmes guilty of arson of an inhabited structure (count two–Pen. Code, § 451, subd. (b)). Holmes thereafter waived a bifurcated trial and admitted all eight alleged priors.

Sentenced to life without the possibility of parole for the murder and a consecutive term of 43 years to life for the arson and priors, Holmes appeals, claiming jury-selection error in the denial of his *Batson*/*Wheeler* motion (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*)). We reject his claim and affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

The sole issue being related to jury selection, there is no need to detail the trial evidence. Jurors evidently found that Holmes entered Mestre's Oakland home, ransacked it and took a television, and bound and killed Mestre, shooting him in the back of the head, cutting his throat, bashing his head repeatedly with a speaker cabinet, spreading gasoline, and setting it ablaze while Mestre was still alive.

Batson/Wheeler motion

Defense counsel Spencer Strellis raised the *Batson*/*Wheeler* motion at the close of jury selection, after prosecutor Mechelle Corriero exercised her third peremptory against a Black prospective juror. Both sides passed the panel right after the motion was denied. Corriero had exercised 17 peremptories, including three against Black prospective jurors, nos. 68, 76 and 81, and two Black jurors remained seated. The court found that a prima facie showing had been made and asked Corriero for her reasons for the challenges. While Holmes only challenges the reasons for one of these—no. 81—we set out reasons for the others to illuminate the full context of the ruling.

No. 68. Corriero had challenged no. 68, the first of the three, because she had four young children, three in preschool, and "expressed sincere concern" about lacking child care for her six-year-old. Then, when Corriero scanned the jury box for peremptories, no. 68 had made eye contact with her "imploringly," placed her hands together "in a prayer-like motion," and possibly uttered or mouthed the word, "Please." She had then thanked Corriero while walking by after being excused. Corriero explained to the court that this was consistent with her approach to other prospective jurors who had conflicts.

No. 76. Corriero had challenged no. 76 because she spoke of a brother having an appeal pending from "a federal case" where he had been acquitted of some charges and convicted of others; and a prosecutor "presented him as a horrible, horrible person." No. 76 questioned why it took five years for eyewitnesses to come forward and felt that they "had been given deals" for their testimony. She supported the appeal and hesitated when asked if she felt her brother had been fairly treated. Corriero felt that no. 76 was "not forthcoming" or "honest" about the case, claiming on one hand that she did not know the

nature of the case—but that it involved violence—yet was able to recite many details about it. No. 76 had a personal experience with "a gung-ho cop" from the Oakland Police Department who had wrongly arrested her, the district attorney later deciding that there was not enough evidence to charge her. Corriero felt that no. 76 had negative feelings about law enforcement and the justice system but was hesitant to talk about them. In a questionnaire response about good or bad experiences with police officers, no. 76 had written that the majority of officers were good but then crossed out apparent qualifications that began: "~~Some of my~~" and "~~the bad~~."

No. 81. Juror no. 81, Corriero recalled, had good written responses but, when she saw him, noticed "a manner by which he was seated in his chair. He was slouched back in his chair somewhat. He—on occasion, he was wearing slipper-type shoes. He would take his feet, on occasion, put them in and out of his shoes. He gave a response as—well, that I did not feel was completely credible. I did not believe his response. He had indicated that he had only ever had—and this is in response to page 15, question number 16, 'Have you or any member of your close family ever had a good or bad experience with a police officer,' he indicated that he's only had good experiences with police officers. He mentioned specifically an incident where he had a flat tire many years ago. The officer changed the tire for him.

"However, when I questioned him further on individual voir dire, I asked him had he ever been stopped for no apparent reason by police officers, and he indicated that yes, he had, and he felt that the officer gave him as a reason for stopping him, that it was simply because it was late, or he was driving when it was too late. And I have to say I questioned him still viewing that simply as having in his lifetime only positive experiences with police officers, because I think it was the circumstance where he was stopped, essentially, profiled because he was an African-American man driving, and I had hesitancy, because he again expressed that he only ever had positive experiences with police officers.

"Furthermore, he works for the Oakland—he worked—he's a postal worker for the U.S. Postal Service, and that was another reason why I excused him.

"THE COURT: I'm sorry. Because 'he works—'

"MS. CORRIERO: As a postal service employee. Even though he does work with some other employees, he's in it. Just made me feel somewhat uncomfortable based on that profession being one that has some hesitancy about.

"So those are all the various reasons.

"THE COURT: You said that profession is 'one that has some hesitancy about'?

"MS. CORRIERO: I have some hesitancy about postal workers. The occupation. And he's been a postal worker with the U.S. Postal Service for 30 years and 6 months.

"THE COURT: Can you describe the hesitancy, what it is and what it's based on?

"MS. CORRIERO: I have been told that postal workers tend to be somewhat unpredictable as jurors, and I, also, know that he worked indoors in the postal office, so he wasn't a letter carrier himself. So I had some discomfort with his profession as well."

The court ruled as to each of the three prospective jurors, finding no race-based challenges. It is unnecessary to detail the ruling as to nos. 68 and 76, except to say that the court essentially agreed with the prosecutor's reasons.

Regarding no. 81, the court had begun its ruling by saying it "would like to see" a case Corriero mentioned as supporting challenges to postal workers as a profession, but continued: "But the Court is instructed, too, by cases to look into the circumstances of the case as I know them to be, my knowledge of the trial techniques of both sides, including jury selection and the manner in which the parties have exercised their other challenges, and the—all my observations of the demeanor and body language of the various jurors who were responding[,] as they were responding."

Returning later, and lastly, to that prospective juror, the court felt that no. 81 "was not necessarily totally forthcoming in his questionnaire. He indicated in his questionnaire that the police were—there's no negatives, only good experiences with the police, is what he indicated. 'I've only had good experiences with police officers,' and indicated how they helped him with a flat tire. But he did indicate verbally he was stopped by the police, because again, he was told it was too late.

"I don't—I'm not up to date on the postal employee position being legally recognized, although, of course, everyone knows about the stories about postal employees coming back and being violent and—but I don't think that's enough for me to recognize a postal employee justification. Certainly, there are stories about going postal. That's something that I can recognize. But I do find that she has a legal, reasonably-based justification as to her exercise of peremptory as to Juror 81. It's factually-based, legally-appropriate, not race-based.

"I find there is no indication as to the three jurors, either individually or collectively, that is not race-based and legally-appropriate."

III. DISCUSSION

Race-based use of peremptory strikes violates the federal constitutional guaranty of equal protection of the law, as held in *Batson, supra*, 476 U.S. 79, and California's constitutional right to a jury drawn from a representative cross-section of the community, as held in *Wheeler, supra*, 22 Cal.3d 258. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66.) "Blacks . . . are a cognizable group" for purposes of *Wheeler* and *Batson* (*People v. Clair* (1992) 2 Cal.4th 629, 652), and the objection procedure is this: " ' " 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination' " [Citation.]' (*Snyder v. Louisiana* (2008) 552 U.S. ___, ___ [. . . 128 S.Ct. 1203, 1207.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898 (*Hamilton*).)

The debate in this case is not with the first or second steps, but the third step, where the court had to determine whether there was purposeful discrimination. Holmes urges that the reasons, if race-neutral, were a sham or pretext masking a race-based challenge to prospective juror no. 81. He bears a formidable burden. "The proper focus of a *Batson*/*Wheeler* inquiry is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. [Citations.] What matters is that the prosecutor's reason for exercising the peremptory

challenge is legitimate. A ' "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citation.]' [Citation.]" (*Hamilton, supra,* 45 Cal.4th at p. 903.) Because the ultimate ruling turns on an evaluation of credibility, we review deferentially on appeal, and uphold the ruling as long as substantial evidence supports it. (*People v. Williams* (1997) 16 Cal.4th 635, 666.) In his attack on the third-stage inquiry, Holmes arguably could rely on a comparative juror analysis for the first time on appeal (*Hamilton, supra*, 45 Cal.4th at pp. 902, fn. 12), but he does not.

Essentially three reasons emerged for the challenge: (1) demeanor (slouching and taking shoes off) suggesting inattention or indifference, (2) lack of candor in experiences with police officers, and (3) long-term employment as a postal worker. We examine them in that order.

1. Demeanor. The demeanor reason was race-neutral and would seem to be a legitimate basis for challenge (*People v. Reynoso* (2003) 31 Cal.4th 903, 920), but we find some tension in the case law. Our state Supreme Court has said of the third-stage inquiry: "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. This is particularly true where the [reason] is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*Id.* at p. 919.) On the other hand, a majority on the federal high court recently stated that it "cannot presume" that a trial court credited and relied on a demeanor-based reason unless the trial court said so, at least where multiple reasons were evaluated. (*Snyder v. Louisiana*, *supra*, 128 S.Ct. at p. 1209 [nervousness].) Since the court here, for whatever reason, did not corroborate the slouching or shoe play, we accept, and the Attorney General concedes, that we cannot rely on that reason.

2. Lack of Candor. The trial court expressly agreed with the prosecutor that the prospective juror's written claim of only positive experiences with police officers was undermined by his acknowledgement of having been stopped for no reason, and case law holds that a court or prosecutor is not required to take a juror's answers "at face value." (*People v. Boyette* (2002) 29 Cal.4th 381, 422.) "[P]rospective jurors with unpleasant

legal enforcement experience or contacts are often excused despite their assurances that they are unaffected by their treatment." (*People v. Barber* (1988) 200 Cal.App.3d 378, 394.) Holmes complains that the reason here "appears to be based on the prosecutor's expectation of how she imagine[d] an African-American man should react to what she perceived as racial profiling." Assuming this is a fair assessment, however, it does not render the reason impermissibly race-based. "[A] challenge based solely on the prospective juror's race is different from a challenge 'which may find its roots in part [in] the jurors' attitude about the justice system and about society which may be race related.' [Citation.]" (*Hamilton, supra,* 45 Cal.4th at pp. 901-902 [Black prospective juror's concern that Blacks are not fairly treated in the criminal justice system was a race-neutral reason for challenge].) Substantial evidence supports the reason.

3. Postal Service Employment. The prospective juror's postal service work was certainly a race-neutral reason, and one that is established in the case law. (*Williams v. Groose* (8th Cir. 1996) 77 F.3d 259, 261; *Johnson v. State* (Ga. 1996) 470 S.E.2d 637, 639.) Holmes assails it as pretext here, first, because the posecutor did not cite "personal experience" but, rather, said she had "been told" that postal workers tend to be somewhat unpredictable as jurors. While we do agree that a negative personal experience could seem like a stronger reason, we are not convinced that this was needed. Case law recognizes that "silly or even superstitious" reasons, while more apt to evoke a negative credibility assessment, are not necessarily invalid. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) Even arguably unreasonable notions like the undesirability of jurors who were "born in Berkeley or linked to dilapidated automobiles" may be valid race-neutral reasons for *Batson* and *Wheeler* purposes. (*People v. Huggins* (2006) 38 Cal.4th 175, 231, fn. 15.) " ' "[J]urors may be excused based on 'hunches[,]' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." ' [Citation.]" (*Hamilton, supra,* 45 Cal.4th at p. 901.)

Similarly, Holmes cannot defeat substantial evidence by faulting the prosecutor's arguably halting articulation of her concerns in the face of questions by the court. She did say that she was concerned about the 30-year length of the prospective juror's job and

that he was not a mail carrier, but worked at a more insulated, indoor job with other such postal workers. The question of pretext versus genuineness was a factual one for the trial court. (*Hamilton*, *supra*, 45 Cal.4th at p. 900.)

Nor are we convinced by the exchange between the prosecutor and court that the court rejected postal employment as invalid or sham. The court only indicated that it knew of no stereotype beyond an employee "going postal" (i.e., violent), and thus could not "recognize a postal employee justification." Reading those remarks favorably to the ruling, it appears that the court was simply saying it could not carve out an *automatic* reason for exclusion. It immediately went on to say, "But I do find that she has a legal, reasonably-based justification as to her exercise of peremptory as to Juror 81. It's factually-based, legally-appropriate, not race-based."

Finally, Holmes challenges the reasons for only one of three challenges. He is entitled to do so, because " 'the striking of a single black juror for racial reasons violates the [federal] equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.' [Citations.]" (*People v. Fuentes* (1991) 54 Cal.3d 707, 715.) But this circumstance also works against him, for the good faith of the other two challenges was implicitly considered by the trial court as part of the full circumstances. Also,"[w]hile the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on [the] objection. [Citations.]" (*People v. Turner* (1994) 8 Cal.4th 137, 168.)

The ruling is supported by substantial evidence. No abuse of discretion is shown.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.